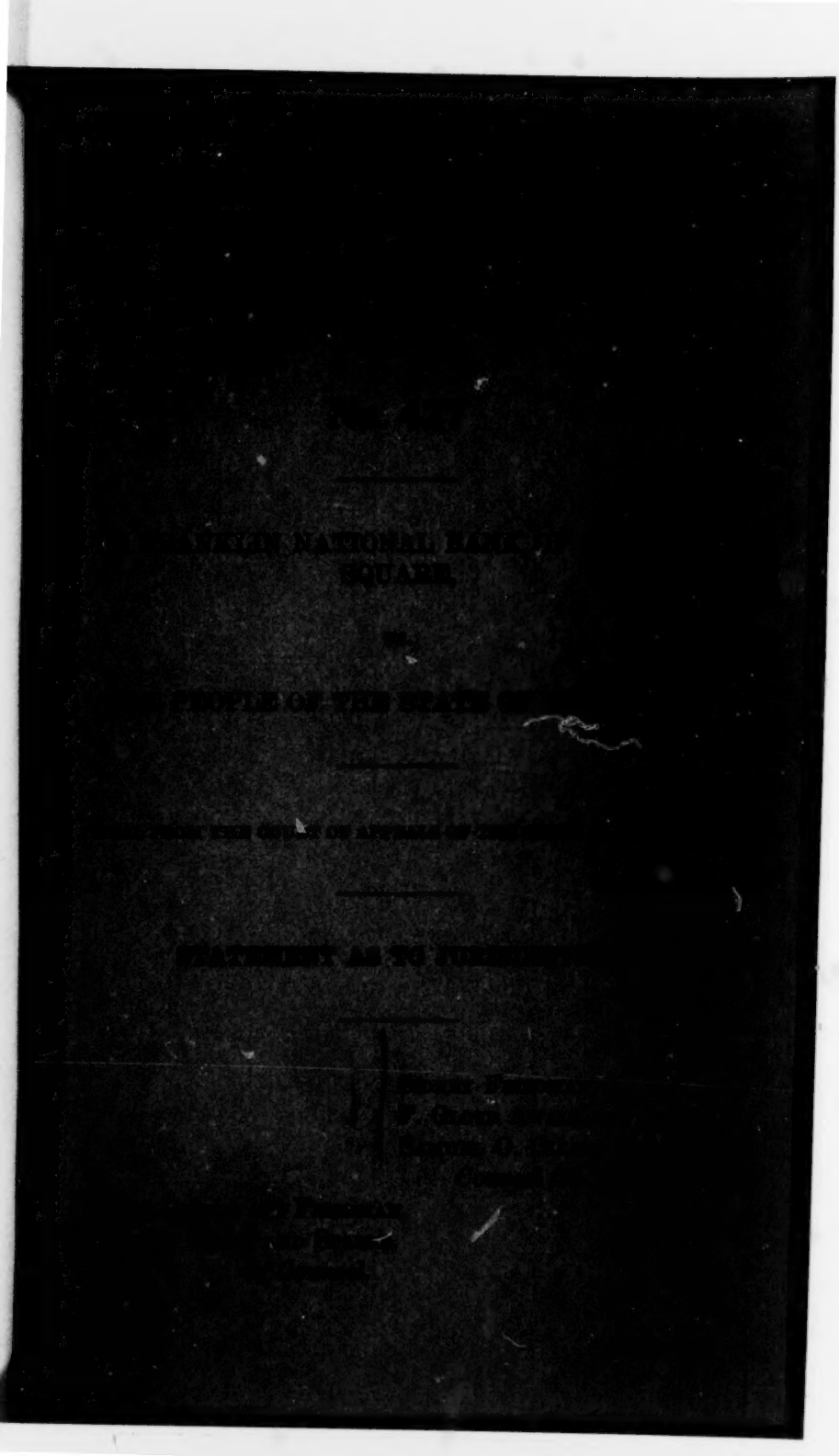

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COURT OF APPEALS—STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff-Respondent,

against

THE FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE,
Defendant-Appellant.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendant-appellant submits herewith its statement disclosing the basis on which the Supreme Court has jurisdiction on appeal to review the judgment of the Court of Appeals of the State of New York entered in this cause.

Opinions Below

The opinion of the court at Special Term is reported in 200 Misc. 557 and a copy is attached hereto as Appendix A. The opinions of the Appellate Division are reported in 281 App. Div. 757 and copies are attached hereto as Appendix B. The opinions of the Court of Appeals have not yet been reported; copies are attached as Appendix C.

Jurisdiction

This appeal is from the final judgment of the Court of Appeals, the highest court of the State of New York from

which a decision in this matter can be had. The judgment is a final judgment and was entered July 14, 1953. A petition for appeal is presented herewith, to wit: on September 29, 1953.

As more particularly appears *infra*, the validity of Section 258(1) of the New York Banking Law was drawn in question on the ground that it is repugnant to the Constitution and laws of the United States and the validity of the State statute was sustained by the Court of Appeals of the State of New York. Therefore, the jurisdiction of the Supreme Court to review on direct appeal is expressly conferred by Title 28, U. S. C., Section 1257(2). The following decisions sustain such jurisdiction: *R. F. C.* v. *Beaver County*, 328 U. S. 204; *Winters* v. *People*, 333 U. S. 507; *Senn* v. *Tile Layers*, 301 U. S. 468.

The Statutes Involved

Section 258(1) of the New York Banking Law and the pertinent provisions of Sections 24 and 19 of the Federal Reserve Act, 12 U. S. C. 371, 461, are quoted in Appendix D.

Question Presented

Is the State of New York empowered to apply Section 258(1) of its Banking Law to a national bank operating in that State and thus prohibit that bank from advertising or otherwise using the word "saving" or "savings" in relation to its banking or financial business in its dealings with the public? Otherwise stated, is the State of New York empowered to prohibit a national bank from quoting in its advertisements and in its business dealings with the public the very words of Section 24 of the Federal Reserve Act which expressly authorize national banks to receive and pay interest on "savings deposits"?

Statement

Plaintiff-respondent sued in the Supreme Court of the State of New York to enjoin appellant, a national bank with principal offices in Franklin Square, Nassau County, New York, from using, in violation of the express provisions of Section 258(1) of the New York Banking Law, the word "saving" or "savings" or their equivalent in its business and in its dealings with the public and from soliciting and receiving deposits as a savings bank. By amended complaint, respondent alleged that appellant's use of these prohibited words had deceived the public and had usurped the exclusive rights of State savings banks and savings and loan associations. Appellant's answer, while denying that it practiced any deception, admitted that it had used the words "saving" and "savings" in soliciting savings deposits, and, by way of affirmative defense, alleged that such usage was sanctioned by the relevant federal statutes and the regulations of the Federal Reserve Board. It was further expressly alleged that, in so far as Section 258(1) purported to prohibit national banks from using the word "saving" or "savings" or their equivalent, the State statute was invalid because (a) it directly conflicted with the Constitution and the paramount laws of the United States, (b) it unduly interfered with the operations of national banks located in the State of New York and (c) it unduly discriminated against such banks in their competition with savings and loan associations and savings banks.

Following the trial at Special Term of the Supreme Court of the State of New York, County of Nassau, the trial court specifically held that the appellant had not deceived the public, stating that the allegations in the complaint charging the bank with simulating and holding itself out as a savings bank were completely unfounded. The court

then dismissed the complaint on the merits, basing its decision on the unconstitutionality of Section 258(1).

The Appellate Division, with one judge dissenting, reversed the determination, expressly overruling each of the contentions as to unconstitutionality made by the appellant as alleged in its answer. The court held that the State statute was constitutional and permanently enjoined appellant "from advertising or otherwise using the word 'saving' or 'savings' in relation to its banking or financial business in its dealings with the public, and from in any way soliciting or receiving deposits as a savings bank."

The Court of Appeals, by a vote of five to two, modified and affirmed as modified, the decision of the Appellate Division. The court found no evidence in the record that appellant had solicited and received deposits as a savings bank and accordingly struck from the injunction the language "and from in any way soliciting or receiving deposits as a savings bank." In sustaining the prohibition against the use by appellant of the word "saving" or "savings" in its advertisements and in its banking or financial business in its dealings with the public, the Court of Appeals upheld the constitutionality of the State statute, expressly rejecting appellant's contentions to the contrary.

The evidence produced at the trial demonstrated that appellant and other national banks were in direct competition with savings and loan associations and savings banks for savings deposits and mortgage investments. It was shown that such deposits and investments were solicited through newspapers, periodicals, radio, television, billboards and various other means. It was also proved that savings deposits constituted a substantial part of the total resources of appellant and other national banks and were consequently of vital importance to them. In this respect, it was shown that the ability of national banks to make

mortgage loans depended directly upon their savings deposits and that their earnings were likewise thus dependent. Appellant adduced proof that the substitute terms "thrift account," "compound interest account," and "special interest account" used by national banks, under compulsion of the State statute, to describe their savings deposits are ineffective and misleading. Expert opinions, testimony describing particular situations, relevant statistics and a survey conducted under the supervision of the Psychology Department of Hofstra College were produced to demonstrate factually that, by and large, the public knows what the term "savings" means and that it does not know the meaning of the substitute terms which national banks are compelled to use or that national banks accept savings deposits. It was the opinion of the several bank experts, bolstered by the Hofstra survey and the statistical proof, that the effect of Section 258(1) was substantially to handicap and burden national banks and to discriminate against them in their competition with savings and loan associations and savings banks.

The findings of the trial court at Special Term that there was substantial interference and discrimination were reversed by the Appellate Division which held that "national banks have enjoyed continued prosperity notwithstanding said statute." This finding was concurred in generally by the Court of Appeals.

The Question Is Substantial

This case affects all national banks operating in New York, the question going to the very heart of their business—the solicitation of deposits.[1] The final determination

[1] Attention is called to the fact that the New York State Bankers Association, representing 650 banks and trust companies in New York including 369 national banks, filed a brief *amicus curiae* in the Court of Appeals supporting the position of the appellant.

of this case may also significantly affect national banks located outside of the State of New York. In the first place, the decision may be considered a precedent in the application of restrictive legislation relating to the word "savings" in California and Minnesota (Section 3394 of the California Banking Code and Title 47.23 of the Minnesota Statutes are quoted in Appendix E). While unlike New York, neither California nor Minnesota has prohibited national banks as such from using the word "savings," the sweep of their respective statutes is broad enough to include national banks within the prohibition. In the second place, so long as the decision of the Court of Appeals stands, it will constitute an invitation to other States to adopt restrictive legislation covering advertising or other phases of the operations of national banks which might seriously impair their ability to perform the functions authorized by Congress.

The determination of the Court of Appeals is novel in upholding the right of a State to prohibit verbatim quotation by a duly authorized bank of the pertinent language of an act of Congress specifically authorizing national banks to conduct an important phase of their business. Indeed, the decision of the Court of Appeals can be construed as prohibiting the promotion by New York national banks of payroll *savings* plans inaugurated at the request of the United State Government to further the sale of government bonds. Furthermore, the decision of the Court of Appeals is in direct conflict with administrative rulings of the Comptroller of the Currency and the Federal Reserve Board.

As shown by their opinions, the trial court, one dissenting member of the Appellate Division and two dissenting members of the Court of Appeals held that the New York statute involved was invalid and unconstitutional because it is in direct conflict with the paramount laws of the United States. It is submitted that this difference of opinion is a further

indication of the substantial nature of the constitutional issues involved.

The claim of unconstitutionality rests upon the three grounds alleged in appellant's answer. Each is discussed below.

A. There Is a Direct Conflict Between the State and Federal Laws

The Court of Appeals recognizes that the extent of the powers of national banks are matters of Congressional intent (*Springfield Inst.* v. *Worcester*, 107 N. E. 2d 315, 316 (Mass.), certiorari denied 344 U. S. 884; *Downey* v. *City*, 106 F. (2) 69, 73 (C. C. A. 2), affd. 309 U. S. 590; *Farmers & Mechanics National Bank* v. *Dearing*, 91 U. S. 29, 34). In seeking to determine such intent, however, the court, we submit, committed serious error. It concluded that, since the *State* in enacting the challenged legislation, had determined that the use of the interdicted words was deceptive, *Congress* could not have intended that national banks should use them in carrying on their business. The court thus made the determination of Congressional intent a matter turning upon the motives of the State legislature. In so doing, the court closely followed the reasoning of the Supreme Court of Iowa which was expressly rejected by the Supreme Court of the United States in *Easton* v. *Iowa*, 188 U. S. 220, 229. As appears immediately below, the Court of Appeals disregarded the legislative history and administrative construction of the Federal Reserve Act and certain amendments thereto and other facts, clearly relevant in the determination of Congressional intent, demonstrating that Congress did intend that national banks might quote the words of the Federal Reserve Act in their business and in their dealings with the public.

1. *The Language of the Federal Reserve Act*

Section 24 of the Federal Reserve Act, as amended (12 U. S. C. 371), specifically authorizes national banks "hereafter as heretofore to receive time and savings deposits." In granting national banks the power to do this type of business, Congress used the word "savings" not once but several times. The appearance of the word in the statute is significant because, as is shown below, its inclusion was deliberate. It is also significant that the grant of the power to receive savings deposits is general and applies to all national banks without limitation. It is a power which may be exercised without reference to the law of any State. The amount which may be received from particular savings depositors, the corporate or individual nature of the depositor, the manner of withdrawal—these phases of the operation of a savings business—are in no way dependent upon any State law. And, most important for this case, the manner of soliciting or designating such deposits is not made dependent to any degree whatsoever on the laws of the various States. Had Congress intended that the laws of particular States should apply, it obviously would have so provided—as it did by the provision in Section 24 that the rate of interest payable on such "savings or other deposits shall not exceed the maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State in which such association is located." The rule of *expressio unius exclusio alterius est* would appear to be applicable. Likewise applicable is the general assumption that Congressional acts are deemed to have general application and are not dependent upon State law unless there is plain indication to the contrary. (*Jerome* v. *U. S.*, 318 U. S. 101, 104.)

Significant in this connection are the provisions of the United States Criminal Code (62 Stat. 733; 18 U. S. C. § 709) relating to advertising by banks and others. The

use by unauthorized banks of certain terms in advertising is there expressly enjoined. But no prohibition appears against the use by national banks of the word "savings." Nor is the method of soliciting deposits or the use of the word, or any other word, made dependent upon State law.

Respondent admits that national banks may advertise. It nevertheless claims that the language most appropriate—the very words used by Congress—may not be employed. Consequently, appellant cannot advise the public that it is authorized to and does receive savings deposits. In addition, since the State statute expressly prohibits the use of language equivalent to the word "savings," any words which appellant might be forced by the State statute to use to attract savings deposits would necessarily be inaccurate and consequently misleading.

2. *Construction of the Act by Congress*

Congress specifically amended the Federal Reserve Act in 1927 to authorize national banks to "continue hereafter as heretofore to receive time *and savings deposits* and to pay interest on the same" by adding the words "and savings deposits" (44 Stat. 1232; 12 U. S. C. 371). This specific authorization recognized that national banks had been accepting savings deposits for some time. That Congress was aware of this fact is clearly indicated by the legislative history of the 1913 Federal Reserve Act and amendments thereto. Thus, the Senate Report on the original Federal Reserve Act stated that "national banks now, through the system of time deposits, carry on a savings-bank business." (S. Rept. No. 33, 63rd Cong., 1st Sess., pp. 27-28. See also the Senate Report on the 1916 amendments to the Federal Reserve Act. S. Rept. No. 481, 64th Cong., 1st Sess.)

The legislative history of the 1927 amendments makes abundantly clear that Congress' use of the words "savings deposits" was not, as alleged by the Court of Appeals,

"merely descriptive of a well-known type or kind of bank deposits," but was a specific authorization to national banks to receive savings deposits and make real estate loans in full and open competition with all types of banks, including State mutual savings banks. (H. Rept. No. 83, 69th Cong., 1st Sess.; S. Rept. No. 473, 69th Cong., 1st Sess.; 67 Cong. Rec. 2830, 2839, 3246-3247; 68 Cong. Rec. 2170, 2171, 2173, 5815.) [2] In addition, national banks were granted broader power to invest in real estate mortgages. The amendments also granted branch banking rights to national banks on the same basis as State banks, including mutual savings banks. Nothing has appeared in subsequent legislation by Congress dealing with the Federal Reserve Act which has changed this stated purpose of the 1927 amendments.[3]

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[2] Perhaps the most pointed expression of the underlying Congressional purpose of the 1927 amendments was made by Congressman McFadden, who introduced and sponsored the bill. After the amendatory legislation had been enacted into law, he said:

> "As a result of the passage of this act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and competitive equality has been established among all member banks of the Federal Reserve System.
>
> • • • • • • •
>
> "First, section 16 amends section 24 of the Federal reserve act *and authorizes a national bank by statutory enactment to carry on a savings bank business* and lend money on the security of real estate." (68 Cong. Rec. 5815, 5818; emphasis added.)

[3] Further evidence of the underlying intent of Congress to place national banks in a competitive position with State savings banks and other financial institutions may be derived from the fact that national banks were authorized to charge interest on loans at the rate allowed State banks, except that, if the State permits others to charge a higher rate, national banks may receive the higher rate (12 U.S.C. 85). National banks may also act as fiduciaries in any State which grants similar powers to State banks, trust companies or other corporations which compete with national banks (12 U.S.C. 248). While Congress permits the States to tax the shares of stock of national banks, the rate may not exceed that on "other moneyed capital" employed in competition with them whether they be banks, corporations or individuals (12 U.S.C. 548; *First National Bank* v. *Hartford,* 273 U.S. 548, 557-558).

3. *Administrative Construction of the Act*

Since Congress intended to improve the competitive osition of national banks, its deliberate inclusion in the)27 amendments to the Federal Reserve Act of the right) receive "savings," although national banks already ere receiving such deposits,[4] is of prime significance, par- cularly when considered in light of the long maintained osition of the Federal Reserve Board that the States ould not forbid national banks to advertise for savings eposits. The Board's administrative position on this ssue was first published in 1915 in a ruling dealing with a 'alifornia statute, which, like the New York statute in- olved in this case, prohibited the use of the word "sav- ngs." The Federal Reserve Board held that, since na- ional banks possessed the power to receive "time deposits" vhich were defined to include certain "savings accounts," he right to advertise for such accounts would seem to be a ecessary incident to the exercise of that power and that, onsequently, the California statute could not be enforced gainst them (1 Fed. Res. Bull. 18-21).[5] Therefore, the

[4] Indeed, Congressman McFadden, in discussing the 1927 amendments n the floor of the House of Representatives, stated:

> "* * * There are on deposit to-day in the national banks a total of savings deposits to an amount of $6,000,000,000, which is about one-fourth of the entire sum held on savings deposits by all banks in the United States. There are nearly 12,000,000 individual savings depositors in national banks, constituting nearly one-third of all of the persons carrying money in savings deposits in all banks. These figures do not include commercial time deposits, but strictly savings." (67 Cong. Rec. 2830.)

[5] The Federal Reserve Board has, pursuant to Section 19 of the Act Appendix D), defined the term "savings deposit" for the purpose of letermining reserve requirements of bank members of the Federal Re- erve System (Reg. D, 12 C.F.R. 204) and fixing maximum interest rates Reg. Q. 12 C.F.R. 217). As thus defined, and in no other way, has ppellant used the word. And since all national banks are members of a Federal Reserve Bank, the definition applies to appellant as to all other ational banks (12 U.S. C. § 461).

well-established rule of statutory construction—that an administrative determination left undisturbed by Congress must be deemed approved by Congress, even if the court itself "doubted the correctness of the ruling" (*Costanzo* v. *Tillinghast*, 287 U. S. 341, 345)—should have been observed by the Court of Appeals. A finding by the Court of Appeals that Congress had approved the administrative determination and had intended, by necessary implication, to authorize national banks to advertise for savings deposits would have resulted in a holding that there was a conflict between the two statutes, and that Section 258(1) of the New York Banking Law was unconstitutional in so far as it applied to national banks.

In addition to the ruling of the Federal Reserve Board discussed above, the Comptroller of the Currency has expressly ruled on the precise question here involved. Under date of July 10, 1939, the Comptroller sent a formal opinion to the Attorney General of New York stating, with detailed supporting reasoning, that national banks in New York were empowered to use the words prohibited by the State statute. (The opinion of the Comptroller of the Currency is attached hereto as Appendix F.)

The interpretation of Section 24 of the Federal Reserve Act by the Federal Reserve Board and the Comptroller of the Currency are entitled to great weight. And in a situation such as the present one, where there is no statutory indication that they are incorrect, where they have been consistently adhered to and followed for thirty-eight years with no dissent, they are "entitled to great respect and should ordinarily control the construction of the statute by the courts" (*Pennoyer* v. *McConnaughy*, 140 U. S. 1, 23. See particularly: *Inland Waterways* v. *Young*, 309 U. S. 517, 524). The failure of the Court of Appeals to give any weight to these rulings, which were urged upon that court,

t them in direct conflict with the court's decision. This nflict further highlights the substantial nature of the estion here involved.

In determining that there is no conflict between the state tute and federal law, the Court of Appeals asserted that e State of New York is merely forbidding a misleading scription of appellant's business which, the State insists, ould lead the public to believe that appellant is a mutual vings bank. Yet the Court of Appeals endeavored to exain the use by Congress of the word "savings" as being erely "descriptive of a well-known type or kind of bank posits." This reasoning is difficult to follow. If, as the urt states, the words of the federal statute are descriptive the type of account which appellant handles, appellant's se of these very words to describe such accounts can hardly e deceptive. And the fact that the Court of Appeals spefically held that there was no evidence that appellant had r intended to solicit and receive deposits as a savings bank conclusive that it did not mislead the public into believing at it is a mutual savings bank. Furthermore, it is pertient to inquire how the words used by Congress can conote "mutual savings bank" when the State statute exressly permits their use by savings and loan associations nd trust companies, the stock of which is owned by savings anks? And if, as the court concludes, the words are nerely descriptive, why would Congress add the term "savngs" to the statute in 1927 when the words "time deposits"—which were defined to include "savings deposits" —were already in the statute and had been since 1913?

B. Section 258(1) Is Discriminatory

In the instant case the trial court expressly found that national banks are in direct and keen competition with savings banks and savings and loan associations for savings

deposits.[6] This finding was not reversed or even questioned by the Appellate Division and the Court of Appeals. To the extent, therefore, that the State statute prohibits national banks from advertising for "savings," while, at the same time, permitting savings banks and savings and loan associations freely to do so, it improperly discriminates against national banks. And this discrimination is emphasized by the fact that the statute not only prohibits national banks from using the words "saving" or "savings," but also prohibits the use of any "equivalent." Such discrimination, it is clear, is an evil which, as shown above, the federal statutes equalizing competition with State banks and State financial institutions were designed to prevent (*First National Bank v. Hartford*, 273 U. S. 548, 557-559; *Tiffany* v. *Nat. Bank*, 18 Wall. 409, 412).

The Court of Appeals did not answer the defendant's contentions regarding the discriminatory nature of the State statute but merely pointed out that there are differences between commercial banks and mutual savings banks. The Appellate Division, however, expressly stated that the State law was not discriminatory because the statute applied to all commercial banks, both State and national. Savings banks, it said, operated under different conditions and, therefore, could be constituted a separate class entitled to different treatment.

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[6] The existence of such competition was recently confirmed by Senate Report No. 781, 82nd Congress, First Session, made in connection with legislation (Section 313 of the Revenue Act of 1951) which amended the Internal Revenue Code to subject savings banks and savings and loan associations to income taxation. The Senate Finance Committee reported, page 25:

> "At the present time, mutual savings banks are in active competition with commercial banks and life insurance companies for the public savings, and they compete with many types of taxable institutions in the security and real estate markets. As a result your committee believes that the continuance of the tax-free treatment now accorded mutual savings banks would be discriminatory."

We submit that the question is not, as the court indicated, whether a savings bank or a savings and loan association is a different type of institution from a national bank. The significant fact is that, in an important phase of their respective operations, viz., the obtaining and investment of savings deposits, savings banks and savings and loan associations are in direct competition with national banks. The New York statute by denying national banks a right which it grants savings banks and savings and loan associations has weighted that competition in favor of state institutions and has discriminated against national banks.

C. Section 258(1) Unduly Interferes With the Operations of National Banks

The Court of Appeals recognized the rule that State laws which substantially hamper national banks are invalid. It concluded, however, that Section 258(1) did not substantially interfere with the operations of national banks in advertising for and receiving savings accounts. The court pointed out that the present New York law was "nearly a half century old" and that other national banks, by resorting to the use of terms synonomous with "savings" such as "special interest account," "thrift account," "compound interest account," did not "seem" to have suffered seriously harmful effects.[7] It found that the number of savings accounts in national banks had increased and that national banks "have enjoyed continued prosperity."

[7] In stating that other national banks had "complied" with the State law, the Court of Appeals apparently overlooked the fact that Section 258 (1) interdicts the use not only of the terms "saving" or "savings" but also their equivalent. If, as the Court of Appeals stated, the expressions "special interest account," "thrift account" and "compound interest account" are "synonomous" with "savings account," they must necessarily be equivalent. Apparently the Attorney General of the State of New York has tolerated for many years this apparent violation by national banks of the letter, if not the spirit, of the law. The Attorney General of the State of New York has issued no ruling or opinion that the use of these

In contrast to these generalized conclusions, it is important to consider the evidence of record and the findings of the trial court. It was proved that savings deposits constitute a large proportion of the total deposits and assets of national banks. The amount which such banks are permitted to loan on the security of real estate mortgages depends on the amount of savings deposits and the amount of their earnings is also substantially affected by the amount of such deposits. The trial court found that the receipt of savings deposits is "a necessary element in enabling defendant to prosecute its banking business," a finding not disturbed on appeal.

The prohibitions contained in the New York statute compel the national banks to call their savings deposits "special interest accounts," "thrift accounts," and "compound interest accounts."[8] The result has been great confusion on the part of the customers of the banks and the public generally. The existence of such confusion was fully supported by the "Hofstra" survey which was admitted in evidence by the trial court and furnished statistical proof that the substitute words forced on national banks were not understood by the public, whereas the public does understand the meaning of the term "savings account."[9] This confusion has resulted in the loss of savings accounts and

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substitute expressions forced upon other national banks does not constitute a violation of the statute. And his continuing inaction gives but little assurance that he may not on any day attempt to enforce the statute as it has been written, notwithstanding the *dictum* appearing in the opinion of the Court of Appeals in the instant case.

[8] There is no proof in the record to support the statement of the Court of Appeals that *all* national banks in New York except appellant have complied with the State statute. Even if such proof had been offered, it would clearly be irrelevant. (*Cf. Abie State Bank* v. *Bryan*, 282 U.S. 765, 772, 775, 776.)

[9] For example, this survey showed that over 85% of the public know what a "savings account" is, but only 7% understand the meaning of "thrift account."

substantial interference with the operations of national banks.

National banks, in keen competition with savings banks and savings and loan associations, must be able effectively to inform the public of their ability and desire to receive and pay interest on savings accounts. It is at this crucial point that Section 258 (1) intervenes with its prohibition against the use by national banks of the word "savings" in advertising or in their dealings with the public.

In the light of the actual effects of the operation of Section 258 (1), the conclusion of the Court of Appeals that the savings accounts of national banks have increased and that they have enjoyed continued prosperity becomes largely irrelevant. Obviously, savings deposits might increase and earnings continue even though the statute operated directly to handicap national banks. It is elementary that the business might grow—even prosper—despite the existence of heavy burdens and handicaps. The facts are not inconsistent. Thus, it was shown at the trial of this case that the dollar increase in savings deposits was due to an increase of money in circulation and to inflation and that savings in national banks have substantially decreased in relation to demand deposits. Significantly, appellant demonstrated statistically that savings deposits in national banks have decreased in relation to savings deposits in savings banks and savings and loan associations. The consequence is clear: general statements regarding growth and prosperity of national banks do not prove that the State statute does not substantially burden or interfere with their business.

Conclusion

The determination of the Court of Appeals of New York leads to the extraordinary result that the mere verbatim quotation by a national bank of the relevant language of

the Federal Reserve Act in the due course of its business subjects the bank, without more, to civil penalties under a State statute. This statute—Section 258 (1) of the New York Banking Law—encroaches on the power and interferes with the operations of national banks and discriminates against them. The Court of Appeals has upheld the validity of the State statute, overruling the contention that such statute is repugnant to the Constitution and laws of the United States. We believe that the question is substantial and of public importance. We respectfully submit that the Supreme Court of the United States has jurisdiction on direct appeal to review the judgment of the Court of Appeals of the State of New York entered in this cause.

Respectfully submitted,

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APPENDIX A

OPINION OF THE SUPREME COURT OF NEW YORK, SPECIAL TERM, NASSAU COUNTY

THE PEOPLE OF THE STATE OF NEW YORK, *Plaintiff*,

v.

FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE, *Defendant*

Supreme Court, Special Term, Nassau County, May 29, 1951

CUFF, *J.*:

The question before this court is the constitutionality of a statute of the State of New York. By means of a properly instituted proceeding, the New York Attorney-General, in the name of the People of the State of New York, seeks an injunction against defendant, the Franklin National Bank of Franklin Square, Nassau County, New York, a corporation organized and existing under the National Bank Act of the United States, restraining it from using the words "saving" or "savings" in its publicity and from holding itself out as a savings bank. Plaintiff bases its suit upon subdivision 1 of section 258 of the New York Banking Law, which reads as follows:

"No bank, trust company, *national bank*, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use any advertisement containing the word 'saving' or 'savings,' or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word 'savings' in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company, national bank, individual, partnership, un-

incorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued." (Emphasis supplied.)

The complaint alleges: that defendant is a national bank organized and existing under the National Bank Act (U. S. Code, tit. 12 § 21 et seq.); that subdivision 1 of section 258 of the New York Banking Law prohibits defendant from using "saving" or "savings" or their equivalent in its business or in soliciting or receiving deposits as a savings bank; that since 1947, defendant has been using "saving" and "savings" in its business; that it has solicited accounts by forms of publicity in which it has used the words "saving" and "savings"; that such use of those words was calculated to and did lead the public to believe that defendant was a savings bank "with all attendant safeguards and benefits" (par. 6); that the use of "saving" and "savings", "as aforesaid", violated said subdivision 1 of section 258 of the New York Banking Law; that although the Banking Department demanded that defendant desist using those words, defendant refuses to do so; that plaintiff has no adequate remedy at law. Plaintiff demands a permanent injunction against defendant restraining it from using the words "savings" or "saving": (1) in its advertising; (2) in its banking or financial business, and (3) as it holds itself out as a savings bank, by the use of a sign, or in its soliciting or receiving of deposits.

The answer admits: that defendant exists by virtue of the laws of Congress (U. S. Code, tit. 12, § 21 et seq.); that it is not authorized to do business or hold itself out as a savings banks; that it has been using "saving" and "savings" in its business since 1947 to solicit savings accounts; that it has refused to discontinue its use of those words, although the New York Banking Department has demanded that it desist; that in its use of those two words, it did not try to lead the public to believe that it was a savings bank, nor does the public so believe. For a complete defense, defendant alleges that subdivision 1 of section 258 of the New York Banking Law is unconstitutional

d void insofar as it purports to relate to defendant and tional banks because: (a) it conflicts with the Constitution and laws of the United States; (b) it unduly interres with and hinders the operations of national banks d defendant, frustrating them in accomplishing the purses for which they were organized, and (c) it discrimiates against defendant and national banks, handicapping em substantially in their competition for savings deposits ith savings banks and savings and loan associations.

The allegations in the complaint charging defendant with audulently simulating a savings bank and fraudulently olding itself out as a savings bank, were wholly unsupported by evidence at the trial. Defendant offered proof at when its bank was remodeled, the architect and builder ere instructed to erect a building which resembled not a avings bank, but a department store and that was done 717). Those charges, I find on the evidence, were completely unfounded; they are dismissed.

The issue at bar is not one of wrongdoing. The Attorey-General seems to acknowledge that by not seeking o recover the penalty of $100 a day which subdivision 1 f section 258 provides for its violation. This case tests he power of the State to legislate as it has (Banking aw, § 258, subd. 1) with relation to national banks. The Attorney-General believes it has that power, while defendnt is convinced that it has not.

Defendant has openly employed the words "saving" and "savings" as it publicizes the fact that it may receive from the public "savings deposits" in the belief that the State has no control over its use of those words. The defendant relies upon certain provisions found in the Federal Reserve Act, which read in part as follows: national banks may "continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such association may pay upon such time deposits or upon savings or other deposits shall not exceed the maximum rate authorized by law to be paid upon such deposits by State Banks or trust companies organized under the laws of the State in which such association is located." (U. S. Code, tit. 12, § 371.)

I will treat with the evidence adduced at the trial. (Numerals in parentheses refer to the stenographer's minutes.)

The proof offered by plaintiff need not be detailed, because defendant admits all of the facts upon which plaintiff rests its case. It challenges only the motives ascribed by plaintiff that defendant sought to represent itself as a savings bank. Defendant offered proof to negative that deception charge in the complaint. I admitted that evidence (although no proof of intent to deceive had been submitted by plaintiff) only because plaintiff proved and defendant admitted that defendant used the words "savings" and "saving" in its publicity, and I felt that defendant was entitled to show that its motives in so doing were marked by good faith. I have disposed of the fraud angle of this litigation; it will not again be referred to.

Returning to the subject of evidence offered by defendant, several presidents and other officers of national banks, including Arthur T. Roth, the president of defendant bank, testified. The experience and long service of these men in the banking world were not questioned. They said compositely that deposits in national banks were of two types—demand and savings; that the latter, interest-bearing deposits, were received, recorded and handled through a separate department of the bank; that the demand accounts were the usual deposits received by any commercial (as distinguished from savings) bank; that savings deposits were indispensable to the maintenance of their respective banks (728-729); that they (except defendant since 1947) refrained from using the words "savings" or "saving" in their business, unwillingly, out of deference to the prohibition contained in subdivision 1 of section 258 of the New York Banking Law (152, 154, 210, 217); that instead of those words they used, perforce, the terms "thrift", "compound interest" and "special interest" in their signs, records (deposit slips and pass books) and publicity in describing their savings department and in making known that they had the legal right to receive savings deposits (152, 210, 236); that having to use those substitutes hampered them in attracting savings deposits (121, 210, 211, 213, 238); that they rated the handicap accordingly imposed upon them as

lefinitely handicapped" (151) "stumbling block" (226) onsiderable handicap" (239, 242), "detrimental" (239) emendous" (236) and similarly; that there was only one vings bank—the Roslyn Savings Bank—in Nassau Coun- ; (this court takes judicial notice of the fact that at bank is not centrally located in Nassau County; nor it in or reasonably near any of the larger business or ngested centres and is rather inaccessible thereto by eans of transportation except automobile).

To continue the resume of the testimony of defendant's itnesses, they testified that the said Roslyn Savings Bank dvertised to no great extent; that New York City savings anks (Nassau County is adjacent to New York City) and s savings and loan associations, as well as Nassau County avings and loan associations, advertise extensively (209) nd aggressively for savings deposits through the media of ewspapers, direct mail, periodicals, radio and other ources, putting defendant and national banks at a dis- dvantage in the competition for savings deposits because hey emphasize the word "savings" (210); that demand leposits compare with savings deposits in their respective anks as follows: John R. Evans, president of the First National Bank of Poughkeepsie for ten years, a banker of twenty-seven years (139-141) stated that 40% of the total deposits were savings (161); Augustus B. Weller, a banker for twenty-nine years, president for seventeen years of Meadowbrook National Bank with two branches in Nassau County, testified that in 1934 the savings accounts totaled twice the demand accounts (215) while currently, the de- mand accounts are $15,000,000 as compared with savings accounts of $12,000,000 (219); that that ratio (about five to four demand over savings deposits) has been maintained in recent years (219-220); William H. Abel, president Central National Bank of Mineola (although only recently made president, Mr. Abel had been executive vice-president for five years and affiliated with the bank for twenty-one years) testified (233) that prior to 1950 demand deposits were $4,000,000, savings $3,000,000 (244); Mr. Roth, presi- dent of defendant, testified that from 1941 to 1948 savings deposits exceeded demand deposits (726) but since 1948 the reverse is true, to wit: 60% demand, 40% savings (738);

John J. Keuthen, president of Wheatley Hills National Bank since 1936 testified that if questioned his answers would have been substantially the same as the other bank officials with the modification that whereas they state that their savings deposits totals have increased in recent years, his bank has not enjoyed that condition but on the contrary, since 1948, his savings deposits have decreased (259).

The cross-examination of the bank officials did not alter the figures given or opinions expressed. Plaintiff's counsel in each instance, developed the point that the bank of which the witness was an officer bettered its deposit position progressively in recent years. But that development, the witnesses said, was not peculiar to Nassau County or even New York State. (153, 154, 221, 222, 226, 251). Inflation, I would say, could be a contributing factor to that condition. I do not think that that general increase in deposits in banks bears upon the problem at bar.

It was stipulated that the testimony of two other bank officials, who were in the courtroom, if called to the stand, would have been substantially the same as that given by the bank officials who had already testified, with the reservation that plaintiff was not conceding the correctness or truth thereof.

Mr. Evans (First National Bank of Poughkeepsie) made the important disclosure that his bank derived more profit from savings deposits than it did from demand deposits (161).

Defendant also introduced evidence concerning a sample poll to show the public understanding of the following terms: "savings", "thrift", "compound interest", and "special interest" as they relate to bank accounts (278). The object of the defense in introducing this evidence was to demonstrate that the term "saving account" is well understood by the public; that when disposed to open a bank account, the public reacts to the power of suggestion which the word "savings" generates and turns to the savings bank with its business; that the three terms which defendant and other national banks are forced in their publicity to substitute for "savings" are not well understood and do not attract depositors in anything like the numbers that the word "savings" does.

This poll was planned and executed under the auspices of Hofstra College, a well-known and highly regarded institution of higher learning with 3,800 students studying the arts, sciences, etc., located at Hempstead, Nassau County, New York. Although defendant paid for the services rendered, the college was actually retained by the Nassau Clearing House Association (277), an organization consisting of all except a few of the Nassau County banks, which serves the common interests of its members (203, 204). The work of the poll was assigned to the psychology department of Hofstra. Its planning and setting up came under the jurisdiction and guidance of Matthew Chappell, professor of psychology at Hofstra and chairman of the department of psychology (278). He worked continuously on the task from beginning to end. His experience, education and knowledge are important in appraising the evidentiary value, if any, to be ascribed to the poll, because he was the key figure. His history, appearance and manner indicate that he is a highly educated person; he has spent much of his life in the educational field, which has included sampling of public opinion; his work has made him a diplomat of the American Board of Examiners in professional psychology (281); while teaching at Columbia University of New York City, he engaged in research work in the field of "public opinion and mass buying behavior" and since 1938 has continued that study (264-265); he worked about two years (1938-1940) with Psychological Corporation in the market and social research division, making use of polling techniques in business and industry; he was employed (1940-1943) by C. E. Hooper, Inc., the firm which conducts the so-called "Hooper Rating" polls; he maintained his own office (1943-1947) as a consultant, conducting polls for business and industry (265); he wrote books on psychology and collaborated with Mr. Hooper, aforementioned, in writing a book entitled "Radio Audience Measurement" (266); since 1938 he has actively participated in from 50 to 100 polling activities to ascertain the public mind on different subjects (269).

Mr. Chappell was aided, as his immediate assistant, by Richard Brumbach, a professor of Hofstra's psychology department (560) and an associate director of its psycho-

logical workshop (561). He had experience relating to polls—their planning, execution and analyses (1945-1950) with a research company (562-563). The field workers were senior students at Hofstra and the others who collaborated on the poll were of its faculty. All persons who participated were paid for their services (644).

This poll is known in the art as "probability sampling" (292). The testimony reveals that it was meticulously planned, executed and analyzed. (266, et seq.) The objective of those who set it up was to query adults residing in Nassau County without *any person* exercising judgment in the selection of those to be interviewed (276, 292). The identities of the interviewees were arrived at solely by a mathematical process (289). The result was a strictly random selection of them (276). By the processes adopted, considered the best method in the sampling art (277), all human judgment in the choice of interviewees—which may control the results of a poll (294) was eliminated (237). One of the objectives of the poll—and an important one—was to afford to every adult member of the population of Nassau County, an equal chance, with all other adults, of becoming an interviewee (289). I find that that ambition was closely approached by reason of the careful, intelligent, unbiased application of those in charge. The same kind of unprejudiced and careful methods, which marked the planning and supervision, were pursued in the actual interviewing (288, et seq., 423-440). Mr. Chappell knew that defendant paid the expenses for the taking of the poll (372) but he did not know that the poll was to be used in a law suit until after the work had been completed and the poll and its results had been presented to defendant (646). Not only those who planned and supervised the poll testified but also two of the interviewers were witnesses (423-440). Upon defendant's counsel's statement that he had eighteen other workers (interviewers) in court ready to testify, a stipulation was entered into by counsel that if the others (the eighteen) testified, that their testimony would be substantially the same as the two who had testified without plaintiff's conceding the accuracy or truth of same (441).

The poll produced the following results: only 15% *did not know* the meaning of the term "savings account", while

53.3%, 62.7% and 52.7%, respectively, *did not know* the meaning of the terms "compound interest account", "special interest account" and "thrift account". Only 19.5% gave an accurate statement as to the meaning of "thrift account", 21.4% as to "special interest account" and 40.8% as to "compound interest account". In this compilation, full credit for accuracy was given to answers to the effect that the meaning of the substitute terms was the same as "savings account".

Without regard to actual percentages, the answers develop the point which this court has appreciated all along by reason of common knowledge, viz: that the public understands the meaning of the term "savings account", for what it really is, far better than it understands the meaning of any of the substitute terms. I am also satisfied, based upon all the proof herein and judicial notice, that the word "savings", when used with the word "account" in relation to a bank, provokes a much stronger appeal to the eye and understanding of the public than do the substitutes, when placed before persons disposed to open an interest-bearing bank account.

Polls, as evidence, are not controlling, of course. Many are misleading; valueless.

The learned deputy attorney-general vigorously opposes the consideration or even the admission of the poll evidence, as hearsay and not within any exception to the well-known rule. Both sides have briefed the question. The use of polls as a test of public opinion by business, newspapers, periodicals and others is growing; already it is widespread (295). There is no doubt that that testimony which is usually called "hearsay" has formed part of the proof at bar. The Attorney-General argues that the answers of those interviewed as reported by the interviewers, upon which the poll rests for its usefulness, in particular, are pure hearsay. On that point Jerome Prince in his recent (1948) revision of Richardson on Evidence (7th ed.) calls that kind of proof original evidence. He says: "Where the mere fact that a statement was made, as distinguished from its truth or falsity, is relevant on a trial, evidence that such statement was made is original evidence and not hearsay." (§ 246.) This proffered proof (the answers) is testimony

that the interviewees made the answers to the questions which the witnesses swear they asked them. It is no more than that. A court accepts or rejects in whole or in part *as a fact* that answers were made as reported by the witnesses, depending upon the reliance that the court places on the testimony of the witnesses. The value of the answers as evidence is something else. But that the answers were made can be a fact. The weight to be given to the answers would depend upon the poll itself. That returns us to the question of whether the poll proof should be received in evidence at all.

A party endeavoring to establish the public state of mind on a subject, which state of mind can not be proved except by calling as witnesses so many of the public as to render the task impracticable, should be allowed to offer evidence concerning a poll which the party maintains reveals that state of mind. The evidence offered should include calling the planners, supervisors and workers (or some of them) as witnesses so that the court may see and hear them; they should be ready to give a complete exposition of the poll and even its results; the work sheets, reports, surveys and all documents used in or prepared during the poll taking and those showing its results should be offered in evidence, although the court may desire to draw its own conclusions. In this trial the learned counsel for defendant adduced proof of the kind to which I have just referred. I think that the proof as to the poll should be received in evidence. I also am satisfied that the conclusions drawn therefrom are worthy of some consideration. Plaintiff's objections to the admission of this proof are overruled.

There is a difference between savings banks and commercial banks including national banks (*Bank of Redemption v. Boston*, 125 U. S. 60). The savings bank has no stockholders. It is owned, if owned at all, by the depositors; total amount that each depositor may deposit is limited; its officers are their employees whom they appoint to receive and invest their deposits which are to be returned to them with the earned interest upon reasonable demand. There are no profits, as such. Profits, if any, ultimately are returned to the depositors in the form of interest. The investments made by their officers are circumscribed. They

may make no commercial loans (loans on unsecured notes or notes secured by personal property other than "legal investments"); the amounts of their mortgage loans on realty are surrounded by statutory restrictions referable to the appraised value of the pledged realty, its location, the nature and age of the improvement thereon, amortization arrangements, duration of loan and stability of borrower (Banking Law, § 235, subd. 6).

The commercial (national) bank is owned by its stockholders. Its officers are the employees of the board of directors, who in turn are the elected representatiives of the stock. Those officers are expected, in managing the bank, to produce profits, which go to the stockholders in the form of ordinary dividends. A commercial bank may make, in the exercise of the sound judgment of its officers, unsecured loans and loans secured by personalty, which may even be merchandise. There is no limit upon the total amount it may receive from each depositor. It may provide money on mortgage loans like the savings bank based upon the appraised value of the pledged realty, but there are not the other rigid restrictions which are imposed upon savings banks (U. S. Code, tit. 12, § 371). While national banks receive and record their savings deposits separately from their demand deposits, both are pooled and provide one working fund. Thus savings deposits control as much as demand deposits, the volume of lending and investing in which national banks indulge.

It has been said that the savings bank is a semipublic institution; that the State in its wisdom seeks to encourage those who will save, particularly in small amounts; that the State has furnished a haven for the thrifty. I do not wish to cast the slightest reflection upon commercial banks and their stability when I say that the legislation with respect to savings banks enacted by this State over the years was unmistakably intended to render the savings bank as safe and sound as laws could, to the end that those small depositors, encouraged as I have said to save, would run the least possible risk of losing their funds, and, incidentally, would receive as much interest as safety would permit. The powers and discretion of the officers of savings banks are indeed narrow and circumscribed.

The New York State Legislatures, enacting laws from time to time, were always seeking to protect deposits in savings banks, it would seem, solely for the benefit of the depositors, to assure each depositor as far as laws could assure, that his or her deposit would always be available upon reasonable demand. That legislation, however, was enacted and the decisions in harmony therewith were written before the National Government insured bank deposits in *all banks*—Federal and State—up to $10,000 (Public Law 797, ch. 967, enacted Sept. 21, 1950). Ten thousand dollars is the limit which a savings bank may accept from any one depositor (L. 1951, ch. 592).

As the matter stands today, all deposits in national banks are insured by the United States Government in exactly the same way as deposits in savings banks are insured, by the United States Government. In the light of this development, has not one of the principal reasons for the studied protective legislation referable to savings banks, including subdivision 1 of Section 258, and the protective attitude of the courts in their reflective decisions become academic? Is that arm of State protection to reassure bank depositors needed any more?

Prompted by its traditional zeal to clothe its savings banks with the ultimate in known safeguards against financial loss by depositors the State of New York, due to its more recent enactment (§ 258, subd. 1) has extended itself to the point where it stands accused by the defendant herein of attempting to preempt certain fields of the banking business essential to the National Government in maintaining its system of banking (U. S. Code, tit. 12, § 371) and by this suit the State seeks to judicially eject from those fields an important cog in that system, albeit a creature of the United States Government—the national bank.

Giving appropriate consideration to the evidence adduced herein by defendant, which proof is either not disputed or not successfully challenged, it is evident that subdivision 1 of Section 258 of the New York Banking Law and Section 371 of the Federal Reserve Act cannot be read together in harmony. There is a violent conflict of legislative authority. We are obliged to ascertain the extent of that

lash and the damage. Is there impairment, hampering, mbarrassment or restriction exerted upon national banks y the New York statute, as they endeavor to achieve the bjectives which Congress contemplated for them? If here is, that is a fatal legislative transgression by a State aw (*First Nat. Bank v. Commonwealth*, 9 Wall. [U. S.] 353, 62; *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 283; *Mc-Clellan v. Chipman*, 164 U. S. 347; *Waite v. Dowley*, 94 U. S. 27, 533).

In specific terms, what does the New York statute seek to accomplish? The answer to that question will expose the inroads of the State statute, if any, upon the Federal grant of power to national banks to receive "savings deposits". The statute may be divided into three, as far as this litigation goes, parts. The first part provides that "No * * * national bank * * * shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business". The second part provides that no national bank shall make use of the equivalent of "saving or savings" *in relation to* its banking or financial business. The third part forbids national banks "in any way [to] solicit or receive deposits *as a savings bank*". (Banking Law, § 258, subd. 1; italics supplied.) I will discuss the third part first. A national bank is not a savings bank. Nevertheless, Congress has granted it the power to solicit and receive "savings deposits" (U. S. Code, tit. 12, § 371.) Obviously any national bank (the defendant is one) availing itself of that power, will provide space and facilities within its walls where such deposits may be made by the public and be received by the bank. That particular part of the bank of necessity will give off an air of sanctuary where savings are to be banked. To that extent the national bank would assume some of the attributes typical of an institution where savings are ordinarily deposited. I cannot perceive how such a situation could be avoided, if the national bank is to receive "savings deposits". Could it be that the authors of subdivision 1 of section 258 of the New York Banking Law intended to render that inevitable situation a violation of that law and to subject the national bank which, perforce gave it expression, to the prescribed penal-

ties? The provision "nor shall" a national bank "in any way solicit or receive deposits as a savings bank" (§ 258, subd. 1), I consider refers to a national bank simulating a New York savings bank for purposes of deception (*People* v. *Binghamton Trust Co.*, 139 N. Y. 185, 190). The element of deception abhors this litigation, because as I have pointed out above, there was a complete failure of proof in plaintiff's case with respect thereto. Therefore, the "third" part of subdivision 1 of section 258 may be disregarded.

But the "first" and "second" parts of the statute are different. To begin with, defendant admits violating those provisions. I find that those parts of the law apply with directness and force to this case. As far as the issues herein presented are concerned, however, the provisions of the law which I have designated "first" and "second" parts may be considered together. The language would seem to be restrictive, confining its prohibitions to those occasions only when a national bank is engaged "in its banking and financial business" (§ 258, subd. 1), but when the nature of the provisions is considered, the prohibitions are actually all inclusive, because only when a national bank is engaged "in its banking and financial business" does it receive "savings deposits" and does it have reason to use the forbidden words "saving" and "savings". Inferentially, subdivision 1 of section 258 forbids a national bank, *inter alia*, to use those words or their equivalent:

(1) in its display of signs on its own premises:

(a) even to indicate its right to receive "savings deposits";

(b) even for directional purposes to guide its customers to the place where "savings deposits" may be received;

(c) even to designate the proper window for such depositing;

(d) even to print the words "savings deposits" on its deposit slips and pass books;

(e) even to print or write those forbidden words in any of its accounting records (see Defendant's Ex.

PP, which requires national banks to use the word "savings" in those reports to the Comptroller of the Currency);

(2) in any form of its advertising or its publicity, which of course, includes oral as well as written, as long as the utterance relates to its banking or financial business.

Other similar inferential injunctions imposed by the law question could be cited. Those enumerated surely amper defendant in the exercise of the power bestowed pon it by Congress as it exerts "such incidental powers s shall be necessary to carry on the business of banking" U. S. Code, tit. 12, § 24). Receiving "savings deposits" s a part (the uncontradicted evidence indicates that it is very important part) of defendant's banking business. The evidence also reveals that defendant could not function without "savings deposits" (728, 729). Therefore, receiving such deposits becomes a necessary element in enabling defendant to prosecute its banking business and to render the service to the United States Government in maintaining its system of banking and to the public which Congress intended it should. If receiving "savings deposits" is a necessary part of defendant's banking business, crippling obstruction placed in defendant's way amounts to *impairment* of defendant's banking business. Likewise, the prohibitions mentioned above, viz: no signs, no printing, no advertising and no publicity, with the words "saving" or "savings" therein, *embarrasses* defendant and certainly *restricts* it "tremendously" (236) in obtaining "savings deposits." (*First Nat. Bank* v. *Fellows*, 244 U. S. 416; *Fidelity Nat. Bank & Trust Co.* v. *Enright*, 264 F. 236, 239, Paton's Digest (1940), p. 645).

To deny to defendant the right to invite the public by all proper means of expression at its disposal, to make "savings deposits" with it, is to curtail the power to receive such accounts, to reduce its effectiveness as an agency handling that kind of financing—in short, to defeat one of the main purposes for which it was created by Congress.

Under such conditions one law or the other must give way. The State law must yield to the Federal law—the supreme law of the land (U. S. Const., art. VI).

Commencing with *McCulloch* v. *Maryland* (4 Wheat. [U. S.] 316), the Supreme Court, as well as other courts, has consistently held that a State statute may not defeat in whole or in part the objectives expressed or implied in an act of Congress which is constitutional. The facts in some of those cases are: In the above case, the State vainly sought to impose a tax upon a branch bank of the Bank of the United States. In *Missouri ex rel. Burnes Nat. Bank* v. *Duncan* (265 U. S. 17) the State offense was legislation which forbade the appointment of national banks to serve as testamentary executors, while State trust companies competing with national banks, were authorized to serve as such executors. In *First Nat. Bank* v. *California* (262 U. S. 366), the invalidated State law provided for the escheat to the State of dormant deposits in a solvent national bank.

A quotation from *Easton* v. *Iowa* (188 U. S. 220) typifies the attitude of the Supreme Court and provides a most obvious reason for its viewpoint. The court said: "That legislation [The National Bank Act] has in view the erection of a system extending throughout the country, and independent, as far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States." (P. 229). That decision also held that Congress "having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations". (P. 238).

To continue with examples of State laws invalidated for interference with Federal instrumentalities, in *Fidelity Nat. Bank & Trust Co.* v. *Enright* (264 F. 236, supra [U. S. Dist. Ct., W. D. Mo., 1920]), the voided State law forbade a national bank to use the words "trust" or "trust company" in its advertising, where the fact was that the word "trust" was part of the national bank's name; the name

having been approved by the Comptroller of the Currency according to the National Banking Act.

I consider that I have cited a sufficient number of varying, as to the nature of the interferences, cases to demonstrate the state of the law with regard to particular situations, some of which, in their facts, approximate the facts in this case (*Fidelity Nat. Bank & Trust Co.* v. *Enright, supra*, for instance).

There is no doubt that creatures of the Congress are subject to States' police powers enacted into law (*Engel* v. *O'Malley*, 219 U. S. 128, aff. 182 F. 365), but the law which accordingly subjects them should be an exercise of a real police power. Plaintiff cites no case in line with the situation at bar which supports his contention that subdivision 1 of section 258 is police power legislation. The facts and law deny that contention in this situation because deposits (up to $10,000) in national banks are insured Federally the same as savings banks' deposits are insured (up to $10,000). I must hold that subdivision 1 of section 258 is not that type of law.

Plaintiff concedes that section 371 of the Federal Reserve Act upon which defendant relies, authorizes national banks, without equivocation, to receive "savings deposits". Plaintiff argues, however, that neither that act of Congress nor any other authorizes a national bank to advertise the fact. The answer to that contention is that such a power may be implied, especially since Congress has provided for national banks "such incidental powers as shall be necessary to carry on the business of banking" (U. S. Code, tit. 12, § 24).

One would be wholly unobserving who did not recognize that there is competition among the banks in the banking world; that the daily press abounds with advertising by banks; that often the rate of interest paid on savings accounts is stressed. A witness in this case testified as to that stressing (209).

It cannot be denied—and it is not— that national banks may advertise for deposits, including savings deposits. The Attorney-General argues that in such national bank advertising, the terms "time accounts" should be used or

"thrift accounts" or one or more of the other substitutes to give public notice that national banks may receive "savings deposits". He would have them use any term except "savings deposits"—the very words found in the act of Congress. Is there any reason why national banks in their publicity should use the term "time deposit" and not "savings deposits"? Those two terms are side by side in section 371 of title 12 of the United States Code.

The Attorney-General further contends that when Congress amended the Federal Reserve Act by specifying "savings deposits" as a kind of deposit which a national bank may receive, that action was without effect and without meaning, because at the time and for long prior, national banks were receiving what actually were savings deposits by virtue of their authority to receive "time deposits" (U. S. Code, tit. 12, § 317). I cannot subscribe to that reasoning. On the contrary, because of the peculiar wording of the empowering provision: National banks may "continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same", I consider that Congress meant to accomplish two results: first, that national banks in the conduct of their business should have the benefit of people's savings deposits and second, that all doubt about the right of national banks to receive such deposits should be dispelled. There had been some controversy concerning the right of a national bank to advertise and use the word "savings" which had been resolved in favor of the national banks by the administrative branch of the United States Government (1 Federal Reserve Bulletin [1915], p. 18). The choice of language by Congress was intended to legislatively put that dispute at rest. If the intendment of Congress was as I have indicated, a State law restricting the publicizing of the power thus granted would tend, may I repeat, to defeat the obvious objective of the law.

National banks may and do advertise (U. S. Code, tit. 12, §§ 583-586). There are authorities directly in point. Paton's Digest (1940) holds that the right of a national bank to receive savings accounts necessarily includes the incidental right to advertise as a national bank for such

accounts (p. 645). This author also expressed the same view in the 1926 edition of his digest at page 1226 (Vol. 2, §§ 637a, 638a). To the same effect is Fletcher's Cyclopedia Corporations ([Perm. Ed.], Vol. 6, § 2508, p. 305). There are Federal departmental opinions holding similarly (1 Federal Reserve Bulletin [1915], p. 18). No judicial determination on the precise question has been cited in the briefs or in the text books.

I am satisfied that national banks, as they use the words "saving" and "savings" in advertising and publicizing that they may receive "savings deposits" are exercising an implied and incidental power conferred upon them by Acts of Congress (U. S. Code, tit. 12, §§ 24, 371).

The restrictive nature of subdivision 1 of section 258 of the New York Banking Law, defeats the purposes for which Congress created defendant (U. S. Code, tit. 12, § 371). That defeat could be entire were defendant obligated to suspend for lack of enough savings deposits (728-9, 737). with which to operate its business. The New York statute is unconstitutional.

Plaintiff's motions to strike out testimony and for judgment upon which I reserved decision are denied. Defendant's motion to dismiss the complaint at the end of the plaintiff's case upon which I reserved decision is denied. Defendant's motion made at the end of the whole case for judgment dismissing the complaint is granted, with costs.

Judgment with costs in defendant's favor dismissing the complaint will be entered.

APPENDIX B

MEMORANDUM OPINION OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, *Appellant*

v.

FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE, *Respondent*

Memorandum opinion by the Appellate Division, Second Department, January, 1953

Action by the People of the State of New York against a national bank for a permanent injunction, restraining defendant from violating subdivision 1 of Section 258 of the Banking Law. Plaintiff appeals from a judgment dismissing the complaint on the merits after trial. Judgment reversed on the law and the facts, with costs, and judgment directed for the plaintiff, with costs, restraining defendant, its officers, agents, servants and employees from advertising or otherwise using the word "saving" or "savings" in relation to its banking or financial business in its dealings with the public, and from in any way soliciting or receiving deposits as a savings bank. Findings of fact inconsistent herewith are reversed and new findings are made as indicated herein. Respondent admitted deliberate violation of the statute, and failed to establish its defense of unconstitutionality. Savings banks have developed in this State as a distinctive type of mutual institution, since their beginning, with special benefits and safeguards. (*Mercantile Bank* v. *New York*, 121 U. S. 138). For almost a century only such banks have been allowed by State law to put forth a sign as a savings bank. (L. 1858, ch. 132.) For almost half a century the only banks permitted to use the word "savings" in the State of New York have been the mutual savings banks. (L. 1905, ch. 564.) Thus there was basis for a legislative finding that in the course of time the word "saving" or "savings" had become so associated with the idea of "savings bank" that, if used by another kind of bank, some people were apt

e misled into thinking it to be a mutual savings bank. *rring, etc., Safe Co.* v. *Hall's Safe Co.*, 208 U. S. 554, ; 9. L. R. A. 148, *Elgin Nat. Watch Co.* v. *Illinois Watch* , 179 U. S. 665; 150 A. L. R. 1095, 1134-1135, and cases d in annotation.) In addition, there is a presumption t there was sufficient basis for the Legislature to act Am. Jur., Constitutional Law, § 132), which respondent led to meet and overcome by competent proof. The lice power of the State is not limited to the preservation public health and safety, but extends to the prevention fraud, deceit and imposition. (*Merchants Exchange* v. *ssouri*, 248 U. S. 365; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 9.) Such power may be exercised to protect not only e intelligent and prudent, but also the ignorant and sh, from being imposed upon. (*Dillingham* v. *McLaughlin*, 4 U. S. 370, 374; *Dent* v. *West Virginia*, 129 U. S. 114, 2; *People ex rel. Bennett* v. *Leman*, 277 N. Y. 368, 375.) ection 258 of the Banking Law is an exercise of the police ower aimed at preventing a deception from being prac- ced upon the public. (*People* v. *Binghamton Trust Co.*, 9 N. Y. 185, 192.) As such, its prohibition of the use f the words in question does not constitute an unreason- ble deprivation of rights. (*Dillingham* v. *McLaughlin*, *upra.*) In such a case it is not necessary that there be ntent to deceive; the State may seek to prevent innocent, s well as intentional, deception. (*Fed. Trade Comm.* v. *Algoma Co.*, 291 U. S. 67; *Quaker Oats Co.* v. *City of New York*, 295 N. Y. 527; *General Motors Corp.* v. *Federal Trade Commission*, 114 F. 2d, 33, 36.) Nor did the estab- ishment of the Federal Deposit Insurance Corporation vitiate the statute in question, for it did not eliminate the need upon which the law was based. Since the assets of this corporation, and the coverage it provides, are limited, its protection against loss is limited. Furthermore, it in no way prevents the public from being misled, to which protection it is entitled (*Fed. Trade Comm.* v. *Algoma Co., supra*), and for which purpose the statute was en- acted (*People* v. *Binghamton Trust Co., supra*). The State statute herein is not in conflict with Federal law. Na- tional banks possess only the powers conferred by the Con-

gress. (*Colorado Bank* v. *Bedford*, 310 U. S. 41, 48.) It is conceded that the provision of the Federal Reserve Act, relied upon by respondent (U. S. Code, tit. 12, § 371), does not expressly confer upon such banks the right to use the words "saving" or "savings" in their dealings with the public; and since both the State and Federal statutes can consistently stand together, it may not be implied that when Congress authorized national banks to "continue * * * to receive * * * savings deposits", it intended thereby to supersede the State statute prohibiting them from advertising in a manner found to be misleading by the State Legislature. (*First Nat. Bank*, v. *Missouri*, 263 U. S. 640; *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 611; *Maurer* v. *Hamilton*, 309 U. S. 598, 614; *Reid* v. *Colorado*, 187 U. S. 137, 148; *Savage* v. *Jones*, 225 U. S. 501, 533-534.) Neither does the challenged statute unduly interfere with the operation of a Federal instrumentality. While there is testimony that the prohibition contained therein imposes an advertising handicap on them in their efforts to increase their interest-bearing accounts, the undisputed evidence that such accounts have grown substantially, and that National banks have enjoyed continued prosperity notwithstanding said statute, refutes the claim that it is a "crippling obstruction." National banks, being *privately owned* stock corporations in which the Government has an interest, are not entitled to the privileges of Government departments (*Emer. Fleet Corp.* v. *West. Union*, 275 U. S. 415, 425-426) and are not entitled to the immunities of the United States, or any State or political subdivision thereof. (*National Labor Relations Board* v. *Bank of America*, 130 F. 2d 624, 626-627, certiorari denied 318 U. S. 791.) State regulations under the police power are not invalid, even when they impose some burdens on the *National Government* of the same kind as those imposed on citizens within the State's borders. (*Oklahoma Tax Comm.* v. *Texas Co.*, 336 U. S. 342, 352; *Penn Dairies* v. *Milk Control Comm.*, 318 U. S. 261, 270-271.) It follows that such a regulation is not improper solely because it places some burden on *national banks*. (*First Nat. Bank* v. *Missouri*, 263 U. S. 640, *supra; Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, *supra.*)

r is the State statute herein discriminatory, for by its ms it applies equally to all commercial banks, State artered as well as Nationally chartered. For purposes regulation, banks may be divided into different classes 2 Am. Jur. Constitutional Law, § 506, pp. 187-188); and vings banks, which do not operate under the same con- tions as commercial banks, form a reasonable classifica- on where, as here, such differentiation is required for valid statutory purpose (*Provident Savings Institution Malone*, 221 U. S. 660, 666; *Mercantile Bank* v. *New York*, 21 U. S. 138, 161, *supra*). Since the prohibition applies ually to all institutions in similar circumstances and perating under the same conditions, it is not such class gislation as is prohibited by constitutional provisions. 12 Am. Jur., Constitutional Law, §§ 504, 505, and cases ted; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *otting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79.) inally, the statute does not forbid the use of the expres- ions heretofore permitted by the State Banking Depart- ment (2 Sutherland on Statutory Construction [3d ed.], 5107, and cases cited); or in terms prohibit the volun- ary publicizing of U. S. Savings Bonds in furtherance of *overnment business* (*Davis* v. *Elmira Savings Bank*, 161 J. S. 275); nor do reports to Government departments ome within its purview. Carswell, Wenzel and Schmidt, JJ., concur;

Nolan, P. J., dissents and votes to affirm, with the following memorandum: Section 258 of the Banking Law is in conflict with the Federal statute (Federal Reserve Act, § 24; U. S. Code, tit. 12, § 371), insofar as it *forbids* the use of the word "savings". I agree that the State has the power to protect the public, by preventing national banks from purporting to act as savings banks and even from using the word "savings" in a manner which might deceive depositors in that respect. The purpose should be accomplished by regulation, however, and not by a prohibition which would prevent even a verbatim statement by a national bank of the Federal law, which specifically permits national banks to receive *savings deposits*. Adel, J., not voting. [200 Misc. 557.].

APPENDIX C

OPINION OF THE COURT OF APPEALS OF NEW YORK, JULY 14TH, 1953

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,

v.

FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE, *Appellant*

DESMOND, *J.*:

Defendant is a national bank, organized under the National Bank Act (U. S. Code, tit. 12, § 21 et seq.). Pursuant to authorization by the Comptroller of the Currency, it transacts banking business in the village of Franklin Square, Nassau County, New York. In this suit, brought by the State because of alleged violations by defendant of subdivision 1 of Section 258 of the New York Banking Law, defendant has been restrained and enjoined "from advertising or otherwise using the word 'saving' or 'savings' in relation to its banking or financial business in its dealings with the public, and from in any way soliciting or receiving deposits as a savings bank". Section 258 (subd. 1, *supra*) is in full as follows:

"§ 258. *Prohibition of unauthorized savings banks and use of the word 'savings'; exceptions as to school savings.*

"1. No bank, trust company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use any advertisement containing the word 'saving' or 'savings,' or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word 'savings' in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company,

national bank, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued."

It is undisputed that defendant has, since 1947, used the words "saving" and "savings" in many different ways, in the advertising and conduct of its banking operations. It has, by advertising and otherwise, solicited "savings accounts", has put up over some of its tellers' windows, signs containing the word "savings", has a special department for "Children's Savings", refers in its literature and printed forms to its "savings department" and, in general, it routinely and extensively uses the words "saving" and "savings" to bring to itself "savings deposits" in competition with savings banks and savings and loan associations in Nassau County and elsewhere. Thus it is clear, without further elaboration of the facts, that this national bank has in fact violated so much of Section 258 (subd. 1, *supra*) as prohibits the use of the two words "saving" and "savings". However, we find in the record no evidence at all that defendant has violated, or threatens or intends to violate, the other prohibition of the above-quoted statute, which runs against "soliciting or receiving deposits as a savings bank". Therefore, so much of the injunction as prohibits "soliciting or receiving deposits as a savings bank" is unwarranted and must be stricken regardless of anything else in the case (1 High on Injunctions [4th ed.] § 22: *Exchange Bakery & Restaurant v. Rifkin*, 245 N. Y. 260, 265, 28 Am. Jur., Injunctions, § 29).

That brings us to our real question: is the State statute above quoted unconstitutional as contravening a controlling and over-riding Federal statute on the same subject, and as interfering with the operations of a national bank?

First, as to whether there is a contrary Federal statute: the enactments which, according to appellant, authorize it, as a national bank, to use and advertise the word "saving" or "savings" are in the Federal Reserve Act, and are Sections 371 and 583-586 of title 12 of the United States Code. The statutory language on which appellant relies is in Sec-

tion 371 (U. S. Code, tit. 12), as follows: "Any such [national banking] association may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such association may pay upon such time deposits or upon savings or other deposits shall not exceed", and in Sections 583-586 (U. S. Code, tit. 12 [now in U. S. Code, tit. 18, § 709]), which (in a negative sort of way) authorize national banks to advertise, and which contain no prohibition against the use, in such advertising, of the word "saving" or the word "savings" (see, also, U. S. Code, tit. 12, § 24, as to "incidental powers" of national banks, and *Hernandez v. First Nat. Bank*, 125 Neb. 199, 205). Defendant-appellant says that the matter is as simple as this: Congress has (expressly) licensed these national banks to receive "savings deposits" and pay interest on "savings", and has (inferentially) licensed them to advertise to the public the provision of such banking services. So, says appellant, we have a direct conflict between the authorizations of the Federal statutes and the prohibitions of the State Banking Law.

There is no dispute as to the respective roles which the United States Government and the several States play, generally, in regulating national banks. Under Section 8 of Article I of the Federal Constitution, Congress has power to, and does, incorporate national banks and has the paramount power of regulating them; any applicable Federal laws are supreme in the field; national banks are subject in many ways to the general laws of the States in which they exist, and must abide by State regulations insofar as the latter do not collide directly with Federal laws, and insofar as they do not frustrate national banking policy or impair the position of national banks in discharging their duties; national banks must obey all non-discriminatory State laws which do not interfere with the functioning of the banks, and which do not contravene Federal laws (*First Nat. Bank v. California*, 262 U. S. 366, 368; *Burnes Nat. Bank v. Duncan*, 265 U. S. 17; *Lewis v. Fidelity Co.*, 292 U. S. 559, 566; *Seabury v. Green*, 294 U. S. 165, 169; *Jennings v. U. S. F. & G. Co.*, 294 U. S. 216; *Anderson Nat. Bank v. Luckett*, 321 U. S. 233; *Roth v. Delano*, 338 U. S. 226, 230; *Standard Oil*

Co. v. New Jersey, 341 U. S. 428, 441; *Lauer v. Bayside Nat. Bank*, 244 App. Div. 601; *Matter of Baldwinsville Fed. Sav. & Loan Assn.* [Van Wie], 268 App. Div. 414, 422, 423; *Clark v. First Nat. Bank of Morrisville*, 130 Misc. 352, 354; *United States Pipe & Foundry Co. v. City of Hornell*, 146 Misc. 812, 815; *Matter of Keene*, 152 Misc. 424, 425; 7 Michie on Banks and Banking, ch. 15, §§ 3, 4, 5). Clearly, "a national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law" (*Lewis v. Fidelity Co., supra*, 292 U. S., at p. 566).

Since our State statute clearly and unambiguously forbids the very thing defendant is admittedly doing, our problem comes down to this: do the Federal statutes above cited contain, or amount to, an express authorization to national banks for such activity, that is, for using the State-prohibited words "saving" and "savings", or is the Federal statutory reference to "savings deposits" merely descriptive of a well-known type or kind of bank deposits, rather than a statutory license to use certain specified words, which in turn are forbidden in this State? We conclude, for reasons hereafter stated, that there is no direct conflict, between the Federal and State statutes, as to what national banks may and may not do by way of advertising for, and taking, "savings deposits". The State of New York does not prevent defendant from carrying on a particular kind of banking business, but does forbid a misleading description of that business.

State laws promoting fairness in business transactions should, of course, apply to national banks (*Schramm v. Bank of Cal.*, 143 Ore. 546, 578; *Steadman v. Redfield*, 67 Tenn. 337, 338-339; and see remarks of Justice Holmes, re competition in *Abilene Nat. Bank v. Dolley*, 228 U. S. 1, 4) Our State law expresses an old, wise policy of protecting our citizens against being fooled (see *People v. Binghamton Trust Co.*, 65 Hun 384, affd. 139 N. Y. 185, as to the legislative purpose). So read, our State statute is valid and enforcible despite a superficial, or seeming, contradiction between the phrasing of the two enactments. In other words, while the Federal statute prescribes the kind of business that national banks may carry on, the State statute, to avoid

deception of our people, interdicts the use, in the Federally-prescribed business, of certain nonessential words, and there is no Federal statute relating to the use of those words, as such. Congress, while interested in protecting its creatures, the national banks, in the use of their proper powers, has no interest in their use of deceptive verbiage. The Attorney-General of New York, in his brief, makes it clear that this State does not claim for savings banks a monopoly on receipt of deposits of the "savings" type, but he insists that the State of New York is acting within its powers in seeing to it that members of the public are not misled into believing that commercial banks, like defendant, are mutual savings banks. He admits that the national banks are empowered to handle "savings" type deposits, and to advertise, but he argues that the State is not hampering either of those activities.

It is unnecessary here to describe in detail the differences between commercial and savings banks (see New York State Banking Law, arts. III, V, VI; 8 Michie on Banks and Banking, ch. 16, § 1; *Matter of Wilkins*, 131 Misc. 188, 193; *State v. People's Nat. Bank*, 75 N. H. 27; *Bank of Redemption v. Boston*, 125 U. S. 60, and see the learned opinion of the Special Term Justice in the present case, 200 Misc. 557, 566 *et seq.*). The difference, shortly stated, is this: commercial banks, State and national, are profit-making business corporations owned by stockholders, while, in New York at least, savings banks are mutual institutions, having no stockholders but earning money for the depositors, the fundamental purpose of their existence being protection of small deposits, and their principal method of accomplishing that purpose being caution and conservatism in investments (see 1 Morse on Banks and Banking [6th ed.], § 3).

On the question of whether this New York statute unduly impedes national banks in carrying out their lawful purposes, it is significant, although not conclusive, that this record shows that none of the national banks operating in New York State, except defendant, have used the word "saving" or "savings", and that all of them (except defendant) have found it possible (although seriously incon-

venient, say defendant's witnesses) to carry on the business of receiving this type of deposit, by the use, in their advertising and other literature and business forms, of such synonymous expressions as "special interest account", "thrift account" and "compound interest account".

The New York Legislature's design and effect to prevent deception as to savings banks has a long history. The first enactment was in chapter 132 of the Laws of 1858, which, among other things, made it unlawful for a certain kind of commercial bank to "put forth a sign as a savings bank" (see, also, L. 1875, ch. 371: *People* v. *Doty*, 80 N. Y. 225). The prohibition against describing a commercial bank as a savings bank was added to and strengthened by a 1905 enactment (ch. 564), which forbade the use of the word "savings", by any but savings banks or building and loan associations. Thus, the general legislative purpose has been asserted for nearly a century and the statute in its present form is nearly a half century old. The validity of this purpose and the general validity of these statutes has, over and over again, been asserted by the State Attorney-General (see 1898 Atty. Gen. 265-267; 1902 Atty. Gen. 314-315; 1907 Atty. Gen. 473-475; 1908 Atty. Gen. 382-383). The 1907 opinion contained a specific holding that national banks had no right to hold themselves out as savings banks, or to advertise as such (however, there was then no specific reference in the Federal laws to "savings accounts"). All of this adds up to this result: that the New York policy and method is an old and reasonable one, that it does not seem, when complied with by other national banks in this State, to have had seriously harmful effects on them, and that, accordingly, the legitimate national banking activity, of taking and advertising for interest accounts, is not substantially interfered with by the State's prohibition of the use of misleading words. Insofar as the record presents a question of fact as to the substantiality of that interference, the weight of evidence confirms the finding of the Appellate Division that the number of accounts of the "savings type" has increased greatly in those national banks in the State which have obeyed subdivision 1 of section 258, and that those national banks "have enjoyed con-

tinued prosperity notwithstanding said statute" (281 App. Div. 757, 758).

We see no benefit to appellant's position in the fact that since 1905, our statute has permitted a "savings and loan association" as well as a "savings bank" to use the words "saving" and "savings". The character and purposes of savings and loan associations are, under New York law (see Banking Law, art. X), so similar to those of savings banks as to call for the same kind of protection.

The judgment of the Appellate Division should be modified by striking from the second ordering paragraph thereof the words "and from in any way soliciting or receiving deposits as a savings bank" and, as so modified, affirmed.

Fuld, J. (dissenting). While federal legislation explicitly authorizes national banks to receive "savings deposits" and to pay interest on "savings" (Federal Reserve Act, U. S. Code, tit. 12 § 371) and vests them with "such incidental powers as shall be necessary" (National Bank Act, U. S. Code, tit. 12 § 24, subd. 7: see *Clement Nat. Bank* v. *Vermont*, 231 U. S. 120, 140), this state's Banking Law, in contrast, unequivocally prohibits a "national bank" from making "use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use [of] any advertisement containing the word 'saving' or 'savings,' or their equivalent in relation to its banking or financial business" (Banking Law, § 258, subd. 1).

Mere reading of these two provisions reveals a conflict, patent and irreconcilable. New York's Banking Law provision severely limits the power of national banks to do exactly what the federal statute authorizes. (See, e.g., 2 Paton's Digest of Legal Opinions [1926 ed.], p. 1226; 1 Paton's Digest of Legal Opinions [1940 ed.], p. 645.) The right to accept "savings deposits" and maintain "savings accounts" can mean very little if the bank, by virtue of state statute, must hide that fact or announce it in terms that fail to make it clear. Indeed, to tell a bank that it can receive "savings deposits" and yet must not publicize the fact is very much like telling a property owner that he may produce vegetables, but must not water or cultivate them.

In a very real sense, the state statute hampers the conduct of banking activities deemed by the federal government to be necessary and beneficial. As the court at Special Term succinctly declared, "To deny to defendant the right to invite the public by all proper means of expression at its disposal, to make 'savings deposits' with it, is to curtail the power to receive such accounts, to reduce its effectiveness as an agency handling that kind of financing—in short, to defeat one of the main purposes for which it was created by Congress. Under such conditions, one law or the other must give way. The State law must yield to the Federal law—the supreme law of the land (U. S. Const., art. VI)." (200 Misc. 557, 571.)

The state acknowledges, as, of course, it must, that national banks are empowered, as an incident of their business, to receive "savings deposits" and maintain "savings accounts." Since those activities are concededly legitimate and in the public interest, there is no basis for the claim that advertising them *in the precise language of the Federal Reserve Act* can be deceptive or harmful. If a national bank conducts only the type of business which the Federal Reserve Act sanctions and if it informs the public of the nature of that business by using only the exact language of the federal enactment, how may it be said —as it is (opinion of Desmond, J., p. 460)—that the state law serves the vital function "of protecting our citizens against being fooled"? *

Section 258 of the Banking Law, insofar as it prohibits national banks from quoting the very words of the Federal Reserve Act, authorizing them to receive and pay interest on "savings deposits", clashes with the paramount federal law and, accordingly, must be stricken as unconstitutional. (Cf., e.g., *Easton v. Iowa*, 188 U. S. 220, 229-230, 238; *First Nat. Bank v. California*, 262 U. S. 366, 368 *et seq.*; *Fidelity Nat. Bank & Trust Co. v. Enright*, 264 F. 236; *Spring-*

* Virtually eliminated, it should be noted, is any risk of loss to those who maintain a "savings, time, or thrift account" in a national bank; such deposits, up to $10,000 by any depositor, are insured by the Federal Deposit Insurance Corporation (Federal Deposit Insurance Act, U.S. Code, tit. 12, § 1813, subd. 1; § 1821).

field Inst. for Sav. v. Worcester Fed. Sav. & Loan Assn., 329 Mass. —, 107 N. E. 2d 315, certiorari denied 344 U. S. 884.)

The judgment of the Appellate Division should be reversed and that of Special Term affirmed, with costs in this court and in the Appellate Division.

Lewis, Ch. J., Conway, Dye and Van Voorhis, JJ., concur with Desmond, J.; Fuld, J., dissents in opinion in which Froesel, J., concurs.

Judgment accordingly.

APPENDIX D

APPLICABLE PROVISIONS OF CERTAIN NEW YORK STATUTES AND OF THE FEDERAL RESERVE ACT

Section 258(1) of the New York Banking Law provides:

"1. No bank, trust, company, national bank, individual, partnership, unincorported association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use any advertisement containing the word 'saving' or 'savings,' or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word 'savings' in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company, national bank, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued."

The pertinent provisions of Sections 24 and 19 of the Federal Reserve Act (12 U. S. C. 371, 461) provide:

"*§ 371. Loans on farm lands and improved real estate; time and savings deposits; loans for construction of residential or farm buildings.*

"Any national banking association may make real-estate loans secured by first liens upon improved real estate, including improved farm land and improved business and residential properties. A loan secured by real estate within the meaning of this section shall be in the form of an obligation or obligations secured by a mortgage, trust deed, or other instrument upon real estate, which shall constitute a first lien on real estate in fee simple or, under such rules and regulations as may be prescribed by the Comptroller of the Currency, on a leasehold (1) under a lease for not less than ninety-nine years which is renewable or (2) under a lease having a period of not less than fifty years to run from the date the loan is made or acquired by the national banking association, and any national banking association may purchase any obligation so secured when the entire amount of such obligation is sold to the association. The amount of any such loan hereafter made shall not exceed 50 per centum of the appraised value of the real esate offered as security and no such loan shall be made for a longer term than five years; except that (1) any such loan may be made in an amount not to exceed 60 per centum of the appraised value of the real estate offered as security and for a term not longer than ten years if the loan is secured by an amortized mortgage, deed of trust, or other such instrument under the terms of which the installment payments are sufficient to amortize 40 per centum or more of the principal of the loan within a period of not more than ten years, and (2) the foregoing limitations and restrictions shall not prevent the renewal or extension of loans heretofore made and shall not apply to real-estate loans which are insured under the provisions of Sections 1707-1715d, 1736-1746, 1748-1748g, Section 1706c of this title or subchapter X of chapter 13 of this title or which are insured by the Secretary of Agriculture pursuant to Sections 1001-1005d of Title 7. No such as-

sociation shall make such loans in an aggregate sum in excess of the amount of the capital stock of such association paid in and unimpaired plus the amount of its unimpaired surplus fund, or in excess of 60 per centum of the amount of its time and savings deposits, whichever is the greater. Any such association may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such association may pay upon such time deposits or upon savings or other deposits shall not exceed the maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State in which such association is located."

"§ *461. Demand and time deposits defined.*

"The Board of Governors of the Federal Reserve System is authorized, for the purposes of this section and Sections 371a, 371b, 374, 374a, 462, 462a-1 to 466 of this title, to define the terms 'demand deposits', 'gross demand deposits', 'deposits payable on demand', 'time deposits', 'savings deposits', and 'trust funds', to determine what shall be deemed to be a payment of interest, and to prescribe such rules and regulations as it may deem necessary to effectuate the purposes of this section and Sections 371a, 371b, 374, 374a, 462, 462a-1 to 466 of this title and prevent evasions thereof: *Provided*, That, within the meaning of the provisions of this section and Sections 371a, 371b, 374, 374a, 462, 462a-1 to 466 of this title regarding the reserves required of member banks, the term 'time deposits' shall include 'savings deposits'. Dec. 23, 1913, c. 6, § 19, 38 Stat. 270; June 21, 1917, c. 32, § 10, 40 Stat. 239; Aug. 23, 1935, c. 614, § 324(a), 49 Stat. 714."

APPENDIX E

APPLICABLE PROVISIONS OF CERTAIN CALIFORNIA AND MINNESOTA STATUTES

Section 3394 of the California Banking Code provides:

"§ *3394. Savings bank business by bank which has not received certificate of authority.* No bank which has not received a certificate authorizing it to engage in the savings bank business shall advertise or put forth a sign as a savings bank, or directly or indirectly solicit or receive deposits or transact business in the way or manner of a savings bank, or advertise that it is receiving or accepting savings, or do anything which might lead the public to believe that deposits are received or invested under the same conditions or in the same manner as deposits in savings banks."

Title 47.23 of the Minnesota Statute provides, in part:

"*47.23 Savings Departments*

"Subdivision 1. Except as specifically authorized by other laws of this state, no individual, partnership, unincorporated association, or corporation, other than a savings bank, safe deposit company, or trust company, holding an effective certificate of authority or license issued by the commissioner of banks and subject to and complying with all of the provisions of law relating to such savings banks, safe deposit companies, and trust companies, respectively, shall in any manner display or make use of any sign, symbol, token, letterhead, card, circular, or advertisement stating, representing or indicating that he, it, or they, are authorized to transact the business which a savings bank, safe deposit company, or trust company usually does, or under these provisions is authorized to do; nor shall any such individual, partnership, unincorporated association, or corporation use the words 'savings' or 'trust' or 'safe deposit' alone or in combination in title or name or otherwise, or in any manner solicit business or make loans or solicit or receive deposits or transact business as a savings bank, safe deposit company, or trust company; except

that a state bank, or trust company, regularly incorporated and authorized to do business under the laws of this state, may establish and maintain a savings department under the supervision of the commissioner of banks, and may solicit and receive deposits in this savings department and advertise the same as such, and every such trust company having a savings department may use in its name or title, in addition to the word 'trust,' the word 'savings' or 'savings bank.' Savings deposits received by any trust company using the word 'savings' or 'savings bank' in its name or title shall be invested only in authorized securities, as defined by law, and the trust company shall keep on hand, at all times, such securities as deposits in savings bank may be invested in to an amount at least equal to the amount of the deposits, and these securities shall be the representative of, and the fund for, applicable first and exclusively to the payments of, the savings deposits. Deposits received by the trust company subject to its right to require notice of withdrawal evidenced by passbooks shall be deemed savings deposits."

APPENDIX F

DEFENDANT'S EXHIBIT NO. OO

A CERTIFIED COPY OF A LETTER DATED JULY 10, 1939, FROM THE DEPUTY COMPTROLLER OF THE CURRENCY TO THE ATTORNEY GENERAL OF NEW YORK

Certificate for Certified Copy

TREASURY DEPARTMENT,

Office of Comptroller of the Currency, ss:

I, J. L. Robertson, Acting Comptroller of the Currency, do hereby certify that the document hereto attached is a true and complete copy of a letter sent by the Comptroller of the Currency. to Honorable John J. Bennett, Jr., At-

ney General for the State of New York, Albany, New rk, on July 10, 1939.

n Testimony Whereof, I have hereunto subscribed my ne and caused my seal of office to be affixed to these pres- s at the Treasury Department, in the City of Washing- and District of Columbia, this 20th day of November, D. 1950.

J. L. ROBERTSON,
Acting Comptroller of the Currency.

[Seal.]

Copy

July 10, 1939.

onorable John J. Bennett, Jr.,
ttorney General for the State of New York,
lbany, New York.

EAR SIR:

There has been brought to our attention opinions of the ttorneys General of the State of New York, relating to he use of the words "saving" or "savings" by national anks in your state in advertising they may receive savings ccounts and to the use of the term "Savings Department" o designate the department in which savings deposits are eceived. These opinions are dated respectively, July 2, 907, reported in 1907 Opinions Attorney General 473, ebruary 6, 1908, reported in 1908 Opinions Attorney Gen- ral 382, December 18, 1916, reported at 10 State Depart- ment Reports 489, and May 25, 1927 addressed to Honor- able Milan E. Goodrich, Gilbert Park, Ossining, New York and not reported.

In this connection our attention also has been called to section 258 of the Banking Law of the State of New York, formerly section 279, which reads as follows:

"1. No bank, trust company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or their equivalent in its banking business, or use any advertisement containing the word 'saving'

> or 'savings', or their equivalent, * * *. Any bank, trust company, national bank, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued."

Inasmuch as it is believed by this office that the above noted opinions of the Attorney General are in error, and inasmuch as it is believed that the statute quoted has no applicability to national banks, the Office of the Comptroller of the Currency would appreciate your reconsideration of such opinions in the light of the following.

It has been clearly established by the courts that, in relation to the organization, powers and operation of national banks, Federal law is controlling if there is a conflict between the Federal law and the law of the State where the bank is situated. The cases relative thereto hold in effect that national banks, being instrumentalities of the Federal Government, are necessarily subject to the paramount authority of the United States and any attempt by the state to define their duties, or to control the conduct of their affairs, is absolutely void where such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties for which they were created. *Old Company's Lehigh v. Meeker* (1935), 294 U. S. 227; 79 L. Ed. 876, 55 S. Ct. 392; *Davis v. Elmira Savings Bank* (1896), 161 U. S. 275; 40 L. Ed. 700; *Easton* v. *Iowa* (1903), 188 U. S. 220, 47 L. Ed. 452; *Farmers' & Mechanics' National Bank v. Dearing* (1875), 91 U. S. 29, 23 L. Ed. 196; *Brownell v. Turman* (1935), 75 F. (2) 913; *Spradlin v. Royal Manufacturing Company* (1934), 73 F. (2) 776. Cf. *Fidelity National Bank and Trust Company v. Enright* (1920), 264 Fed. 236, in which an unsuccessful endeavor was made to prevent a national bank from using the words "Trust Company" in its title, the Court saying *inter alia*: "When the Government of the United States enters any field over which Con-

ress is given expressed, or necessarily implied, jurisdic-
on, it appropriates that field to the fullest extent neces-
ary to insure the complete and effective exercise of its
overeignty. The name of a national bank must be ap-
roved by the Comptroller of the Currency. It can be
hanged, or its use interferred with, by no other authority.
We have here, then, a national bank empowered by the laws
f the United States to act in a fiduciary capacity and bear-
ng a name confirmed by national authority. *Clearly any*
ct on the part of the state which impairs, hampers, em-
arrasses, restricts, or, in effect, wholly prevents, the dis-
harge of its functions as a national banking institution
with the incidental powers enumerated must be void, be-
ause in express conflict with the paramount laws of the
United States." (Italics supplied.)

Also, the Supreme Court of the United States has often pointed out the necessity for protecting Federal agencies against interference by state legislation. *M'Culloch v. Maryland* (1819), 4 Wheat. 316, 4 L. Ed. 579; *Osborne v. United States Bank* (1824), 9 Wheat. 738, 6 L. Ed. 204; *Farmers' and Mechanics' National Bank v. Dearing, supra; California v. Central Pacific Railroad Company* (1887), 127 U. S. 1, 32 L. Ed. 150; *Davis v. Elmira Savings Bank, supra*; *Easton v. Iowa, supra*; *Covington v. First National Bank* (1904), 198 U. S. 100, 49 L. Ed. 963; *Farmers & Mechanics Savings Bank v. Minnesota* (1913), 232 U. S. 516, 58 L. Ed. 706; *Choctaw, Oklahoma and Gulf Railroad Company v. Harrison* (1914), 235 U. S. 292, 59 L. Ed. 234; *Bank of California v. Richardson* (1918), 248 U. S. 276, 63 L. Ed. 372; *First National Bank v. California* (1922), 262 U. S. 366, 67 L. Ed. 1030. The Court in *First National v. California, supra*, in discussing the question whether a state could confiscate the dormant deposits of a national bank under a state law stated at page 370 that: "The success of almost all commercial banks depends upon their ability to obtain loans from depositors, * * *" *i.e.*, that the success of all commercial banks depends upon their ability to obtain deposits. The Court indicated that the state could not, by the confiscation of dormant deposits, impair the bank's ability to obtain deposits.

Thus, all powers that are expressly granted by Congress, through Federal legislation are paramount over any laws of a state which attempt to control or to impair the efficiency of such banks in exercising powers so expressly granted.

National banks, at the present time, are, by the express terms of Federal law, granted the power to "continue hereafter as heretofore to receive time and savings deposits."

As an actual fact, national banks have been permitted, under interpretation of the Office of the Comptroller of the Currency and the Federal Reserve Board, to receive savings accounts and establish savings departments for a period of more than 20 years.

In amending section 24 of the Federal Reserve Act, (Act of December 23, 1913, 38 Stat. 251) Congress by Act of Sept. 7, 1917 39 Stat. 752, expressly provided that national banks "may continue hereafter as heretofore to receive time deposits and to pay interest on the same".

This provision in the 1917 amendment was enacted by Congress subsequent to the time that an opinion of counsel for the Federal Reserve Board had been published at page 18 of the 1915 Federal Reserve Bulletin holding that a statute of California forbidding a commercial bank to advertise that it received savings did not prevent a national bank in California from advertising that it received savings accounts. The opinion stated in effect that Federal law relating to the establishment and operation of national banks is superior to and controlling over a state law, which might otherwise apply to or govern the operation of national banks; *that on time deposits, it was evident that the right to advertise and solicit such savings accounts was a necessary incident to the exercise of that power and that no state law can interfere with its exercise.*

Thus, inasmuch as it had been held under the provisions of a published legal opinion of a Federal Bureau administering the Federal Reserve Act that the power to hold and pay interest on time deposits by national banks also included the power to accept and pay interest on savings accounts, the 1917 amendment was an approval on the part

of Congress of the principle that national banks could accept such deposits.

This office consistently followed the legal opinion of the Federal Reserve Board subsequent to 1915 and permitted national banks to organize and maintain savings departments and accept savings accounts. In recognition of this practice of national banks, Congress further amended section 24 of the Federal Reserve Act by Act of February 25, 1927, 44 Stat. 1224, to expressly provide that national banks "* * * may continue hereafter as heretofore to receive time *and savings* deposits and to pay interest on the same * * *." (Italics supplied), thus, removing any doubt as to the power of national banks to receive savings accounts.

Therefore, with the right of national banks to accept savings deposits clearly established under powers expressly granted by Congress, it is believed, in conformity with the cases cited above, that any State law which interferes with a national bank in the maintenance of a department in which such deposits are accepted under the title of "Savings Department", or from freely advertising the fact that national banks have the right to accept such savings deposits, is an attempted exercise of authority which expressly conflicts with the laws of the United States and impairs the efficiency of agencies of the Federal Government to discharge the duties for which they were created.

It also should be pointed out that, under section 258 of the laws of the State of New York, quoted above, if national banks were to advertise that they were permitted by Federal law to accept savings deposits, or if national banks in their advertisements would publish *verbatim* the Federal law, expressly granting them the power to receive savings deposits, they would be violating the provisions of section 258 and subjected to a severe penalty if such state statute would be held applicable thereto.

Certainly it cannot be contended either that national banks do not have the right to solicit time or savings deposits which they have the express right, under Federal law, to accept, and upon which their existence depends

(See *First National Bank v. California, supra*) or that national banks do not have the right to publish *verbatim* sections of Federal law under which they operate.

Therefore, it is submitted to you for your consideration, that the opinions of the Attorneys General, noted herein, are in error and that section 258 of the Banking Laws of the State of New York, quoted herein, is of no application to national banks.

Yours very truly,

(S.) C. B. UPHAM,
Deputy Comptroller.